United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2118

To Be Argued By
F. Timothy McNamara

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-2118

B
P/S

PATRICK VINCENT REO,

Petitioner-Appellant,

vs.

MAURICE H. SIGLER, Chairman,
United States Parole Board and
GEORGE C. WILKINSON, Warden,
Federal Correctional Institution,
Danbury, Connecticut,

Respondents-Appellees.

On Appeal From the United States District
Court For the District of Connecticut

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

STATEMENT OF THE CASE

Claiming that he was treated unconstitutionally by the Board, Petitioner, Patrick V. Reo, commenced an action in the United States District Court, District of Columbia, against Maurice Sigler, Chairman of the United States Board of Parole. This action was commenced on April 26, 1976.

On June 4, 1976 that Court transferred the matter to the District of Connecticut where on June 18, 1976 Robert C. Zampano, District Judge, construing the petition as a writ of habeas corpus ordered Sigler to show cause why the writ should not issue.

Thereafter, the writ was amended, and service was made on the United States Board of Parole and George Wilkenson, Warden of the correctional institution in Danbury.

A response by the government and Reo's replication of this response followed.

On September 22, 1976 the District Court dismissed the petition and entered judgment for the government. Judge Zampano's decision is unreported.

This appeal followed.

STATEMENT OF FACTS

Patrick V. Reo and 9 others were charged with certain activities relating to hijacking. [App. 32]

On May 26, 1972, Patrick V. Reo plead guilty to Count 4 of a fifty-one

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count indictment. Court 4 charged him with obstructing, delaying and affecting interstate commerce by robbery of goods from interstate shipment. United States District Court, District of New Jersey (Criminal 750-71). [App. 9]

Reo was sentenced to 12 years imprisonment for this offense by Fredrick B. Lacey, J. [App. 9]

On February 3, 1976, Reo received his initial parole hearing at the correctional institution in Lewisburg, Pennsylvania. The panel recommended parole pursuant to an approved plan effective April 9, 1976. [App. 2-3; 13]

Reo was given notice soon after by the Commissioner of the Northeast Region of the United States Parole Board that the decision of the panel was being referred to the National Directors for reconsideration pursuant to 28 C.F.R. 2.24. [App. 3;13]

By notice dated March 1, 1976, Reo was notified by the National Directors that he was continued for another hearing in December, 1977. [App. 8] The reasons for continuance were:

> "Your offense behavior has been rated as greatest severity because you were involved in a large scale hijacking operation in which persons were kidnapped and in which one victim died. You have a salient factor score of 8. You have been in custody a total of 47 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of more than 45 months to be served before release for cases with good institutional program performance and adjustment. Board guidelines for greatest severity cases do not specify a maximum limit. Therefore, the decision in your case has been based in part upon a comparison of the relative severity of your offense behavior with offense behavior examples listed in the very high severity category."

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By subsequent administrative appeals Reo exhausted his administrative remedies. The decision by the National Appellate Board was affirmed without modification. [App. 14]

Although Reo had been indicted for fifty-one counts, he plead guilty, as a result of a plea bargain, to only count four: "obstructing, delaying and affecting interstate commerce by robbery of goods from interstate shipment."

The presentence report indicated that the government's statement of Reo's activities were that he "assisted in the switching and disposal of stolen merchandise".[App.2:34]Reo was a late entrant into the conspiracy.[App.2] The presentence report further noted that when "a new location for storage and switching of merchandise" was needed "the P&J Truck Stop in Hoboken operated by the defendant, Patrick V.Reo, was secured and the ring continued its operations before all ten defendants were arrested. [App. 2:34]

The Parole Board's reason for assigning Reo the "greatest severity" rating where Board guidelines do not specify a maximum limit for incarceration, were based on the nature of his offense and involvement with the hijacking ring as it claimed were set forth in the presentence report. [App. 16] Involvement with the hijacking ring's activities included consideration of his alleged offenses i.e., the offenses charged in count five which had been dismissed. [App. 16].

As of March 1976, Reo had been in custody of a total of 47 months. He had a salient factor score of 8. Classification under "Robbery (weapon or threat)" in the very high severity classification (28 C.F.R. 2.20) would have

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lead to guidelines 36 to 45 months in prison. [App. 8;5]

Reo conducted his trial by affidavit. He acted as his own attorney. [App. 6]

His initial formulation of issue stated broadly that the actions of the United States Parole Board violated due process and were arbitrary and capricious.

ISSUES

I. Were the actions of the Parole Board arbitrary and capricious, or did they violate Reo's constitutional guarantee of due process in law in that:

A. The Board unfairly considered only certain aspects of the presentence report, that is what crimes Reo had been indicted for, while ignoring the government's opinion of Reo's actual role in these crimes indicted.

B. The Board erred in basing Reo's severity rating on the bare fact that he had been indicted for an offense, without considering the government's opinion that he had not, in fact, had any connection with that offense.

C. The Board erred in the examining and relying upon the presentence report and holding Reo accountable for the conduct of others.

II. Did the District Court err:

In holding that the mere allegation of an offense will support an offense severity rating.

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ARGUMENT

I. INTRODUCTION

For reasons that he (Reo) cannot understand, the Parole Board and the District Court appear to believe that his presentence report in Criminal No. 750-71, United States District Court, District of New Jersey, contains material that it, in fact, does not.

The presentence report begins as the report for all the defendants and as to Reo only states: "Patrick V. Reo assisted in the switching and disposal of stolen merchandise." [App. 34] Nowhere does the report claim that Reo held drivers against their will or had anything to do with the acts which led to the death of a driver.

Yet - continuously he has found that his case is being handled as though he did such acts and that the presentence report supports those allegations when it, in fact, does not.

The Report itself - see generally F.R. Cr. P. 32(c)-was not an exhibit at Reo's trial. The substantive contents of the report had, however, been placed in evidence through Reo's verified petition - [App. 2] - about which the government had factual agreement. [App. 14].

The actual report is now before this Court, [App. beginning at 31], as an object which may properly be judically noticed. U.S. v. Merrick Sponsor Corp., 421 F. 2d. 1076, 1079 n. 2 (2d. Cir. 1970); Kalimian v. Liberty Mutual Fire Insurance Company, 300 F. 2d 547, 549 (2d. Cir. 1962); cf.

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Moore v. Estelle, 526, F 2d. 690, cert. denied_____U.S._____, 96 S. Ct. 3180, _____L.Ed. 2d_____(5 Cir. 1976).

Reo's pleas from the time he was informed by the Board that his offense behavior rating was of greatest severity based upon material in the pre-sentence report (see Affidavit of James C. Rogers dated June 30, 1976) [App. 15-16] has been that the report did not support such a conclusion. [See App. at 2 and at 3]

In this regard he is totally correct unless the mere indictment of an offense can have a meaning beyond being simply a charge.

If there is one constant thread that runs through each of the parole cases that this Court and other have decided, it is that the offender must be given the opportunity to rebut erroneous information upon which the Parole Board relied. See Note, 60 Minnesota Law Review 341, 360 et seq (1976), Procedural Due Process in Parole Release Proceedings; Billiteri v. United States Board of Parole, 541, F. 2d 938 (2d Cir. 1976).

We now turn to an evaluation of the actions which have led us here.

II. ANALYSIS OF QUESTIONS PRESENTED

Clearly at each step of the proceedings the indictments against Reo have weighed against him; first with the sentencing Judge and then with the Parole Board.

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We ask this Court to conclude:

(1) A mere dismissed indictment may not be considered as evidence of the commission of the offense set forth therein;

(2) If a presentence report does not state what it was alleged to have stated and if the trial decision concludes that the report formed the substantive basis for the Board's action, then Reo has been treated unfairly and should be given a new hearing.

Thus, we ask this Court to require the Board to give Reo a new hearing to correct these fundamental errors.

III. DISCUSSION

A. Parole Board Action

It is settled, in this Court, and elsewhere, that the activities of the federal parole authority may be judicially reviewed and assessed. Menechino v. Oswald, 430 F. 2d 403 (2d. Cir. 1970), cert. denied 400 U.S. 1023 (1971); United States ex rel. Johnson v. Chairman, N.Y. State Bd. of Parole, 500 F. 2d. 925 (2 Cir.), vacated as moot sub. nom. Regan v. Johnson, 419 U.S. 1015, 95 S. Ct. 488, 42 L. Ed. 2d 289 (1974); eg. Bradford v. Weinstein, 519 F. 2d 728 (4th Cir. 1974), vacated as moot 423 U.S. 147, 96 S. Ct. 347, 46 L. Ed. 2d 350 (1975).

The actions of the parole authority can be examined under the rubric of due process of law, Johnson, supra., 500 F 2d at 928. A related yardstick of judicial review is whether the actions of the parole authority were

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arbitrary and capricious. Billiteri v. United States Board of Parole, 541 F. 2d 938, 944 (2d. Cir. 1976).

It has been held that the habeas remedy pursuant to 28 U.S. C.§2241 is a proper way to review a decision by the Parole Authority, Id.

Reo was "continued" for another parole hearing, despite the recommendation of parole by the hearing examiners, because he had been indicted for "greatest severity" - see 28 C.F.R. Sec. 2.20 - offenses in a fifty-one count indictment. This is explicit in the decision by Judge Zampano. [App. 28-29]. The question discussed here is whether the very act of indictment can determine the length of incarceration for Reo.

Reo, in his verified petition, submitted evidence to the District Court of what the presentence report indicated that his crimes and actual participation were. The government expressly conceded that there were no factual disagreements with Reo's petition - [App. 14, para. 14] - and the affidavit of James C. Rogers, [App. 15-16] further indicated, albeit in a confusing and misleading manner, that Reo's sole role, as perceived and conceded by the government was the switching and disposal of stolen merchandise.

Any confusion is easily cleared by reference to the actual presentence report [App. 31 et seq.]

It is clear that Reo did not kidnap. He did not murder. There is no basis in the prisoner's file for any conclusion that he did. See Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974).

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Despite the uncontested view of the crimes Reo committed (and plead to and was convicted for) the very fact of indictment is viewed, by the Board, as sufficient to support a declaration that Reo belongs in the greatest severity category. As Reo in his pro se petition noted:

> ...this "reason" as applied to petitioner is arbitrary and unreasonable; it flies in the face of uncontroverted facts which clearly establish my participation in the crime; it punishes for what others, presently incarcerated, actually did and plead to; it violates the basic concepts of fact finding and due process and is unconstitutional. [App. 3]

The case law, as it has developed, is supportive of the view that this type of activity by the Parole Authority is unlawful.

First, it should be noted that the now reorganized U.S. Parole Commission has recognized that the incorrect application of guidelines, and the use of erroneous information to base a decision are frequent grounds of appeal and litigation. They are among the "possible arguments which might result in a changed decision." See Notice of Proposed Rulemaking, 42 Federal Register 29934. Thus, they are specifically provided appeal grounds in a proposed amendment to 28 C.F.R. §2.25. Id.

This recognition is happy, as these two areas can leave the upmost discretion to the parole authority and lead to unfair, arbitrary, incorrect and occasionally bizarre results. This is well illustrated by the case at bar. See the discussions in Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 835, et seq. (esp. 836 n. 119); p. 878 et seq. (1975); Note,

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60 Minnesota Law Review 340, 360-364, Procedural Due Process in Parole Release Proceedings.

In Billiteri, supra., a panel of this Court decided a case with some factual similarity to the case at bar. The actual holding in the case was that the Court had no jurisdiction over the habeas corpus application, because the warden of Billiteri's federal correctional center had not been served with legal process At 948.

En route to that holding, the Court discussed, by way of judicial dictum, various aspects of the parole hearing process. These comments, while of a limited precedential value, are instructive. See e.g. Kastigar v.U.S., 406 U.S. 441, 454-455, 92 S. Ct. 1653, 32 L. Ed. 2d 212; U.S. v. Bell, 524 F. 2d 202, 206. (2d Cir. 1975).

The point raised on appeal important to the case at bar was "whether the Parole Board can consider the circumstances of the prisoner's offense behavior as described in his presentence report." Billiteri, supra., At 944.

Cases are discussed in which it was held that a sentencing Judge could consider unadjudicated criminal conduct in passing sentence.

The Court then decides that, a fortiori, what the sentencing Judge can see the Parole Board can see. The Board is "certainly entitled to be fully advised of the contents of the presentence report and to use it in giving an offense severity rating and for such other purpose it finds necessary and proper." Id.

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On the facts of the case at bar, there is no need to disagree with that statement. If the Board had used the contents of the report, that is the government's view of what Mr. Reo's crime was, he would, in his view, not be incarcerated today. We need go no further.

As a matter of law, however, there is value in qualifying the Court's statement. The presentence report can be used by the Parole Board as the sentencing Judge uses it. This inclused the procedural safeguards built into the use at sentencing see United States v. Malcolm, 432 F. 2d 809, 816 (2d Cir. 1970); United States v. Weston, 448 F. 2d 626; United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L. Ed. 2d 592. (1972).

So, even if the facts of the case were otherwise, it can be asserted that, as a matter of law, when the Parole Board considers the presentence report in assessing whether parole should be granted, a fortiori, they must provide the same procederal safeguards that are provided at sentencing. This being accepted, then this statement, from United States v. Needles, 472 F. 2d 652, 658 (2d Cir. 1973) can be especially noted:

> ...since sentences should not be based upon misinformation, a defendant should not be denied an opportunity to state his version of the relevant facts... and in some circumstances the probation officer should be requested to provide substantiation of challenged information submitted to the Judge.

How each case must be approached is left to the discretion of the Judge. Id.

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In the case at bar the mere indictment of an offense, the commission of which is in the view of the government in the presentence report, not in any way related to the activities of Reo, provided the essential reason for the severity rating. If the report had stated otherwise and to the extent the Board might have derived the idea that Reo was connected with the indicted offense there was, consistent with Needles, a duty to substantiate in some way Reo's connection with the crime indicted. This they failed to do. (They could not do it as Reo had no connection as shown by the record.)

At the District Court it was uncontested as to the contents of the presentence report. This being so, Judge Zampano should have held that the mere indictment of an offense, when the record demonstrates no causal connection with the crime, is insufficient to raise a severity rating.

Several cases have held that there must be afforded a prisoner an opportunity to test the accuracy of presentence report information. Grattan v. Sigler, 525 F. 2d 329 (9th Cir. 1975); Foddrell v. Sigler, 418 F. Supp. 324 (M.D. Pa. 1976); Cox v. Benson, 548 F. 2d 186 (7th Cir. 1977).

A recent decision has held that unadjudicated criminal conduct cannot even be considered. Pernetti v. U.S., 21 Criminal Law Reporter 2033 (D.N.J. 1977).

Surely the fairness mandated by due process of law and this Court's decision in Johnson means that the parole authority must view the presentence

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information fairly. Compare Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974).

The discussion infra., as to the holding in Billiteri, and the protections that must be afforded by the parole authority in considering that information; and the authorities that have decried the inaccuracy of those reports - e.g. Parole Release Decision Making and the Sentencing Process, 84 Yale L.J. 810, 878 et seq. (1975), lead to these corrolary points that must be viewed as consistent with present law:

--that when the parole authority considers the presentence report (or any other materials properly before it) it must do so fairly, giving consideration to the portions that might mitigate the offense severity rating as well as those portions that would be viewed as exacerbating or harmful.

--that when the parole authority relies on a presentence report it cannot take the mere fact of indictment for an offense and use it to boost a severity rating when it is demonstrated by the government itself, in the report, that the subject person did not commit the indicted crime and had no causal connection with it.

The mere act of indictment cannot be allowed to determine the length of incarceration. This puts the prosecutor in a role not intended by our constitutional scheme. Cf. Coolidge v. New Hampshire, 399 U.S. 926, 91 S. Ct. 2022, 26 L. Ed. 2d 791 (1971)

Cases must be distinguished in which the claim that the offense behavior

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could not be based on the presence report. e.g. Manos v. United States Board of Parole, 399 F. Supp. 1103 (M.D. Pa. 1975); Lupo v. Norton, 371 F. Supp. 156 (D. Conn. 1974); Pernetti v. U.S., supra., were made or there was found to be a sufficient causal relation for the conclusion to exist. See discussion of previous Billiteri cases in Billiteri, supra. At 940-943.

See also, below discussion.

B. DISTRICT COURT

The District Court in its decision below, noted:

> In the instant case, the Board informed petitioner that his "greatest severity" rating was based on consideration of his alleged offense [footnote omitted] See Lupo v. Norton, supra. [371 F. Supp. 156 (D. Conn. 1974)]. The petitioner makes no claim that his alleged offense was other than what the Board relied on; and therefore theBoard's classification of his offense is proper.
> [App. 28-29].

First, for this discussion, it must be understood what the "alleged offense" refers to. This is the indicted offense, which was dismissed. [App. 9]. Reo himself noted that he had been indicted for these offenses. [App. 4]. He vigorously and without opposition argued, however, and presented evidence that the presentence report indicated his activity was otherwise, and fortified this by his presentence and affirmations in his verified petition. [App. 2].

To the extent that "alleged offense" as explained in footnote 3 and the

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passage just quoted indicates that the District Court believed that the government, in its presentence report, viewed Reo as having in some way participated or have been connected with the Count Five offenses, this will be discussed, infra.

The District Court cites three cases in support of his proposition that classification was proper because of consideration of the "alleged offense". Manos, Lupo and Billiteri, (supra.)

In Lupo, Judge Newman, writing before this Court's decision in Johnson, surveyed first how a sentencing Judge could use allegations of criminal conduct that have not resulted in conviction. He noted this Court's decision in United States v. Malcolm, supra. In that case Malcolm plead guilty to bank robbery and later moved, pursuant to F.R.Crim. P. 35 or (alternatively) 28 U.S.C. §2255 for vacation, correction or reduction of his sentence.

On appeal following a dismissal of the Motion as frivolous, Malcolm contended:

> ...(3) he was sentenced illegally because the sentencing Judge ...confused his criminal record and labored under a false assumption about his cooperation with City, State and Federal authorities...At 811.

The record at several pretrial proceedings showed "that the Judge was confused, if not altogether mistaken, about Malcolm's prior criminal record." At 816.

"Misinformation or misunderstanding that is materially untrue regarding a prior criminal record or material false assumptions as to any facts relevant to

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sentencing, renders the entire sentencing procedure invalid as a violation of due process. Townsend v. Burke..334 U.S. at 740-741..."Id. Even though there were no actual untrue facts (Malcolm had admitted the unadjudicated offenses) "We cannot assume Malcolm suffered no prejudice from the confusion."

Judge Newman further noted that "the use of alleged misconduct in parole decision-making is, from one standpoint, more disquieting than in sentence proceedings. Court's traditional reluctance to impose procedural due process [but see Johnson] protections upon parole proceedings leaves prisoners exposed to the risk that untrue charges will jeopardize their chances for parole, and that risk is not subject to minimizing procedures such as those adopted in Malcolm, Picard [United States v. Picard, 464 F 2d 215 (5th Cir. 1972)] and Weston [United States v. Weston, 448 F 2d at 634 (9th Cir. 1971)]

Judge Newman assays three choices: prevent the Board from considering "unproved or at least unsubstantiated" charges, which he disapproves; erect procedural protections such as contained in Malcolm, which he approves but feels bound to disallow due to Menechino; leave the prisoner the risk "that parole may be denied because of an allegation that is untrue, unchallenged..."

In the case in front of him Judge Newman noted that the Board had failed to identify Lupo's alleged offense as the reason for parole denial: this deprived him "of the opportunity to challenge serious allegations that they wish

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to contest." (P. 161)

Judge Newman later notes, "consideration of an alleged offense violates no presently cognizable constitutional right of these petitioners." Id.

Thus an examination of the thrust of Judge Newman's reasoned opinion, is that there is a clear danger (which the case at bar illustrates) of reliance upon alleged offenses, and that, but for this Court's decision in Menechino, which he interpreted as imparting no due process protection to parole release, he would erect procedural safeguards such as there are in the Malcolm case.

Manos was a case where petitioner contended that he was improperly computed as high instead of moderate. "The Board rated the severity of the offense as high on the basis of the twenty-two count indictment charging the petitioner with preparing false tax reports which deprived the government of approximately $150,000.00, and on the basis he had previously been convicted of preparing false tax reports".

Although petitioner claimed that the two counts plead to totaled only $20,000.00 and he should have been rated as moderate - see C.F.R. 2.20 he made no claim that he had not participated in the alleged offenses and certainly didn't point out that the government agreed.

Furthermore, the Court, relying on Lupo, failed to update the cornerstone of Lupo - that no due process adhered in parole - and reconcile the discussion and intent of Judge Newman.

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Foddrell v. Sigler, supra. is also distinguishable. There no challenge to the defense behavior rating was made (418 F. Supp. at 326 n. 3); the Court further held that data relating to unadjudicated criminal conduct could be considered provided there was "an opportunity to dispute its accuracy"; Lupo was relied upon but with the limitation that there must be the above procedural protection. [Citing Grattan v. Sigler, supra.]

The latter case held there must be an opportunity to test the accuracy of presentence report information.

In all of these cases, there is a basis difference from the case at bar. In the case at bar all the evidence submitted, especially the government's version of the crime contained in the presentence report, shows that Reo was not connected with the alleged offense

Consideration of the alleged offense is one matter, however, troublesome that is; when it is conclusively shown that all there is is a bare allegation, and parole is denied for that reason, constitutional rights have had to be trampled to reach that decision. Any other conclusion would allow the prosecutor, by the mere act of indicting, regard less of the basis, to determine the length of incarceration of a federal prisoner. That is what has happened here.

C. MISLEADING PAROLE ANALYSIS; RELIANCE THEREON

A substantial problem in this case is determining the meaning Judge Zampano imparts to "alleged offense". There are two possible meanings to

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this phrase, both of which lead to differing legal consequences.

The first is that "alleged offense" refers to the mere act of indicting. There is no disagreement, on the record, that Reo was indicted for more serious offenses; he states in his petition, and the affidavit by Rogers notes that the presentence report indicated the same (about this, see infra.). [Compare App. 4 and 16].

The second is that Judge Zampano was led to believe that the presentence report indicated that Reo had some causal connection with the more serious offenses. In other words, the presentence report is generally deemed to present the government's version of what conduct actually occurred. Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 878 et seq. The affidavit of Rogers is misleading in this regard.

If this is the meaning to be imparted, i.e. that the "alleged offense" not only has been indicted but, further, is alleged (but unadjudicated), then, this is simply incorrect.

The contents of the presentence report have been placed in evidence through Reo's petition, about which the U.S. Attorney conceded there were no factual disagreements. [App. 14] Further the report itself is before the Court.

The actual "contents" of the report - see F.R.Cr.P. 32 (c) - are to the effect that Reo assisted in the switching and disposal of stolen merchandise. That is the government's view of Reo's activities. As introductory and prefactory material, wholly unnecessary to the actual presentence report,

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some of the counts to which persons had plead guilty were discussed. [See App. 31-33].

The true "contents" of the report are, without contest, that Reo did nothing less or more than his switching activities. Evidence properly before the District Court further noted Reo's very limited activities and his avowed denials of any causal connection with the more serious offenses.

Did the District Court err in basing its decision on the analysis of Rogers, such analysis leading the Court to believe that the presentence report supported the Court's statement that (Reo) "was alleged to have committed (offenses involving) the holding of drivers of stolen vehicles against their will and the death by suffocation of one driver"? (Footnote 3, See App. 28)

When the presentence report is laid alongside the analysis of Rogers and Judge Zampano's conclusion drawn from that - clearly it supports neither the analysis nor the conclusion;nowhere,is it alleged that Reo's "criminal activity" was as set forth in Judge Zampano's footnote, which is the cornerstone of his opinion.

If the conclusion, supported by Footnote 3, is that Judge Zampano erroneously relied on the analysis of the presentence report presented by Rogers to the effect that the serious offenses were not only indicted but were, in fact, alleged by the government (but unadjudicated), then this is clear error on the face of the record.

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For the reasons discussed in A&B, infra., the decision by the Parole Board, before Judge Zampano's reliance upon a misleading analysis, was in error in basing a rating on a mere indictment where the record indicated no causal relation to the serious offenses the rating was based on.

So, independent of this error by the District Court, Reo must be afforded a new hearing in his case.

CONCLUSION

In closing, it should be emphasized that Reo, conducted the trial below pro se, by Affidavit prepared and mailed from his correctional center. His actions on his behalf should be construed liberally, Haines v. Kerner, 404 U.S. 519, 520-521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972).

Reo was clearly denied due process of law; the actions of the parole board were without warrant, arbitrary and capricious.

The record before this Court shows what Reo was indicted for; what the government contended he actually did; what he contended he actually did - and somehow, for reasons he just can't fathom - how he was held accountable for what he didn't do and what everyone apparently agreed he didn't do.

The promise of Johnson was that "a statement of reasons will permit the reviewing court to determine whether the Board has adopted and followed criteria that are appropriate, rational and consistent, and also protects the inmate against arbitrary and capricious decisions or actions based upon impermissible considerations."

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This Court must realized this promise; the protection offered must not be snatched away.

Patrick V. Reo respectfully submits that there has been error, and requests relief from this Honorable Court.

RESPECTFULLY SUBMITTED,

Appellant, Patrick V. Reo

BY: _____

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